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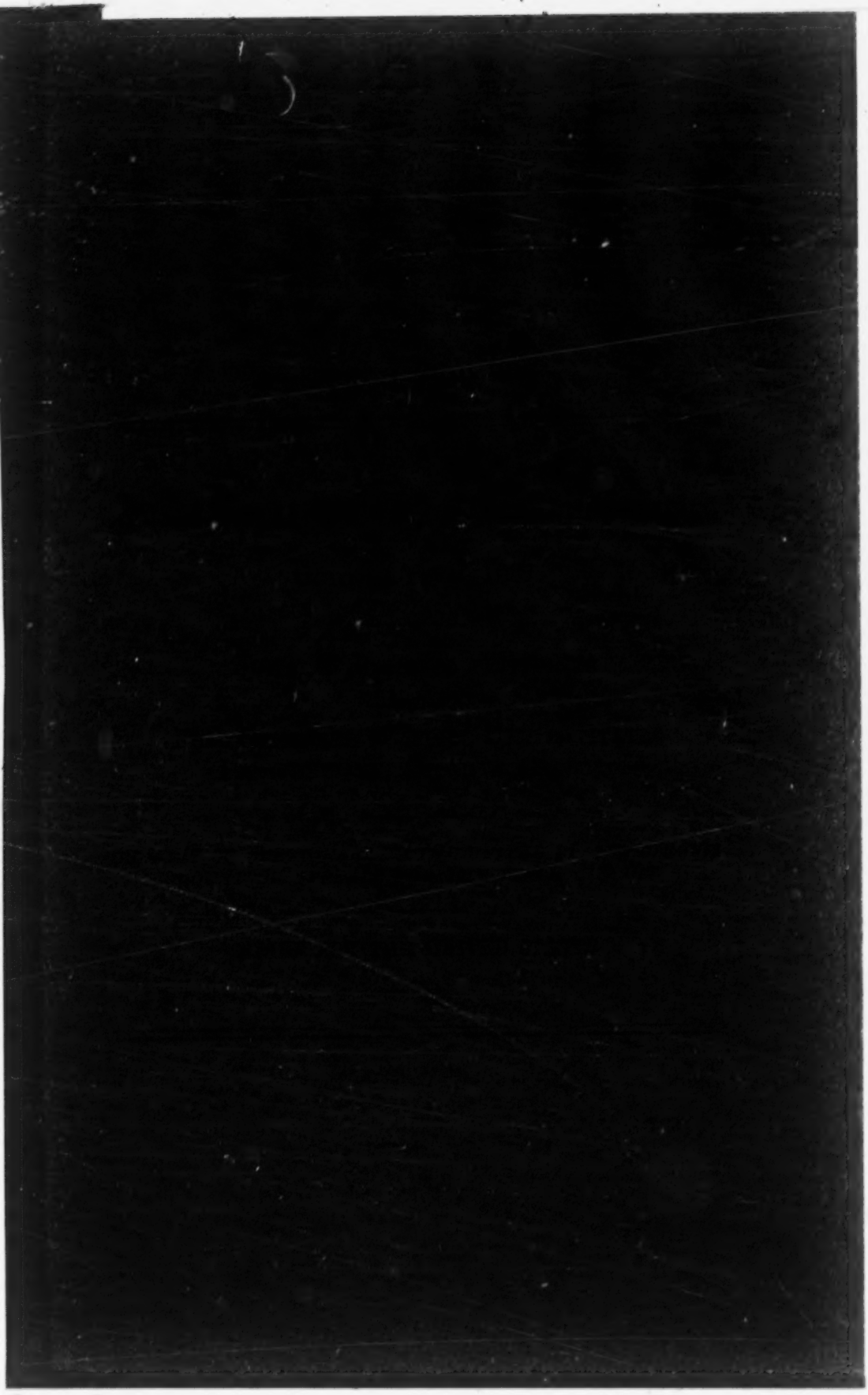

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# In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 699

JOHN A. JOHNSON, PETITIONER

*v.*

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The District Court's order discharging the writ of habeas corpus and remanding the petitioner to custody (R. 56–57) is based on its opinion reported at 13 F. Supp. 253, discharging a similar writ issued as to petitioner. The opinion of the Circuit Court of Appeals (R. 65–70) is reported at 92 F. (2d) 748.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 24, 1937 (R. 70). The petition for a writ of certiorari was filed in this Court

January 13, 1938. It was granted February 14, 1938 (R. 73). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

Petitioner and his codefendant were tried for a felony in a United States District Court. They were represented and advised by counsel before their trial. They appeared in court at the time of the trial without counsel, made no request of the judge or showing for the assignment of counsel, and, in response to questions by the trial judge, announced that they had no counsel and were ready to proceed. Petitioner's codefendant conducted the defense, examined witnesses, and addressed the jury. The questions presented are:

1. Whether, under these facts, the right to assistance of counsel was denied.

2. Whether, if error was committed by the trial judge in not assigning counsel upon its own initiative in the absence of a request by the petitioner, such irregularity divested the court of jurisdiction so that its judgment should be set aside by proceedings in habeas corpus.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

The undisputed facts, as well as those as to which there is a conflict in testimony, were summarized in the opinion of the Circuit Court of Appeals (R. 66–68). As the petitioner does not question the accuracy of this summary, the Government adopts it as the statement of the relevant facts. For the convenience of the Court references to the record have been inserted.

"Appellants were arrested in Charleston, South Carolina, on November 21, 1934, charged with feloniously uttering and passing four counterfeit $20.00 Federal Reserve notes and with knowingly and feloniously possessing 21 counterfeit Federal Reserve Bank notes, with intent to defraud. A hearing was had before a United States commissioner, at which they were represented by counsel of their own choosing. They were bound over to await the

action of the United States grand jury and, being unable to give bail, were confined in a local jail (R. 5, 66). An indictment was returned against them at the next term of court (R. 53–55) and on January 23, 1935, they were brought into court, pleaded not guilty and were tried to a jury, with the result that a verdict of guilty was rendered (R. 21, 33, 55). They were sentenced to be imprisoned in the Atlanta penitentiary for four years and six months. No appeal was taken from this judgment (R. 21, 55). In December, [June] 1935, they filed petitions in the United States District Court for the Northern District of Georgia, seeking release on habeas corpus (R. 7). The petitions alleged that the judgment of conviction was an absolute nullity, on the grounds that they were innocent of the charge and were denied compulsory process for obtaining witnesses in their favor and to have the assistance of counsel for their defense, in violation of the 6th Amendment; and were therefore denied due process of law, in violation of the 5th Amendment. The District Court appointed competent counsel to represent them on the trial of the habeas corpus cases and evidence was taken on the hearing. The District Court reached the conclusion that they had been deprived of constitutional rights as alleged but that, as the trial court had jurisdiction and the judge was not prejudiced nor swayed by any improper influence, the judgment was not void and the errors and irregularities com-

plained of could be corrected only on appeal (R. 8, *Bridwell* v. *Aderhold,* 13 F. Supp. 253). No appeal was taken from these judgments. However, in December 1936 the applications for release on habeas corpus were renewed on the same grounds (R. 4–9). The District Court again appointed competent counsel to represent appellants on the second trial before him and they were represented by competent counsel on this appeal.

"There is some conflict in the evidence appearing in the record but the following facts may be considered as proved with reasonable certainty. When appellants were brought into the District Court in South Carolina the indictment was read to them and they signed pleas of not guilty. They were asked by the judge if they were represented by counsel and replied 'no' (R. 5, 21, 27–29, 41, 45, 48–49) and were then asked by him if they were ready for trial and replied 'yes' (R. 22, 24, 27–28, 30, 42). They did not request the judge to appoint counsel for them, he did not do so of his own motion and they were not represented by counsel at the trial.

"Appellants are white men and were both in the service of the United States in the Marine Corps. Bridwell had had eleven years continuous service and was a corporal (R. 46, 48). The term of service of Johnson is not shown. Bridwell had attended a country school until he was 15 years of age. Johnson had had fifth grade eduction (R.

48). During the trial Bridwell assumed charge of the defense for both appellants, cross examined government witnesses, took the stand in his own defense, and at the close of the case addressed the jury (R. 22, 25, 33, 46, 47). Johnson did not testify. There was evidence tending to show that Bridwell conducted the defense very well for a layman and showed some familiarity with legal procedure (R. 22, 25, 26, 33). During the trial Bridwell stated that he did not think that men of such limited knowledge as appellants would know counterfeit money when they saw it and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, who was a deputy sheriff in charge of tax collections and handled considerable money in performing his duties. He testified that the money was counterfeit and that that fact was readily discernible (R. 6, 34, 46–47). Bridwell had objected to the testimony of other witnesses but no objection was made to the introduction of this witness nor to his testimony.

"Bridwell testified the attorney who represented them before the commissioner continued to represent them until some time in January, and was paid $100 for his services; that he released them because they would not follow his advice to plead guilty, and they had no more money to pay him; that before the trial they made efforts to secure another lawyer, naming him, but were unable to get in touch

with him because they were in jail (R. 41, 43–44, 48).[1] Bridwell also testified, and this was corroborated by Johnson, that, in the presence of the judge, he asked the United States Attorney if he could be represented by counsel, and was told by him that in South Carolina counsel was not appointed by the court except in capital cases (R. 41, 45).[2] He then asked if he could have witnesses subpoenaed, and he was told by the United States Attorney that it was too late (R. 46). The United States Attorney, his assistant, and the clerk of the court, who were present at the time, denied that Bridwell made inquiry as to securing either counsel or witnesses, and denied that the United States Attorney made the statements attributed to him (R. 21, 23, 24, 26, 28, 33, 34, 39). Appellants further testified they did not know and were not advised of their right to ask for a new trial or take an appeal until after they had been removed to the penitentiary, when they

[1] The testimony of the petitioner and Bridwell at the pages in the record referred to indicate that they employed counsel the day after their arrest, that he consulted with them in jail several times after the Commissioner's hearing and advised them that their only chance was to plead guilty, that they several times requested him in writing to release them from their contract of employment, and that he withdrew from the case on January 14, 1935.

[2] The testimony referred to was given by Bridwell. Johnson merely testified that the District Attorney replied that they did not appoint counsel in South Carolina (R. 49). Bridwell further testified that he asked the Clerk if they could have counsel (R. 41). This is not corroborated by Johnson (R. 49).

were told by a fellow prisoner.[3] With his assistance they prepared an application for appeal (R. 7–13), but the trial judge declined to allow it, on the ground that it came too late and he was without jurisdiction (R. 30). There is no doubt that the time for an appeal had elapsed under the criminal appeals rules."

In addition to the facts thus recited by the court below it may be pointed out that the District Court discharged the writ of habeas corpus which is the subject of this appeal and remanded the prisoners to custody (R. 56–57). Both petitioner and Bridwell appealed to the Circuit Court of Appeals for

[3] As there is no testimony to this effect, what the court undoubtedly refers to is the allegations in the petition that petitioner "did not know that after his trial he had a right to move for a new trial or to appeal and was not at any time informed of these rights until many months after the trial" (R. 7). The Government, however, in its answer neither admitted nor denied this averment for want of sufficient information (R. 13). The testimony of the petitioner was to the effect that he made continuous effort after the trial to get a lawyer (R. 49). Bridwell also testified that they tried through their jailers and by a messenger boy to get a lawyer subsequent to the trial (R. 42, 44–45). The official who was in charge of the jail testified, however, that he made daily rounds of the jail and remembered seeing every prisoner, that he knew the petitioner and Bridwell, saw them frequently after their trial, and that no such request was made of him (R. 40). Although petitioner and Bridwell wrote a number of letters from the penitentiary commencing within a few days after their arrival there and including a letter to their former lawyer, no letter was written to seek a new trial or appeal until May 15, 1935, more than three months after their conviction (R. 29, 43, 50–52).

the Fifth Circuit. The appeals were consolidated and heard on the same record (R. 2–3, 65–66). On November 24, 1937, that court unanimously affirmed the judgment of the District Court (R. 65–70). Bridwell is not a party to the petition to this Court for certiorari (R. 52), having been released on parole (R. 52). On petitioner's present record of prison conduct and with the benefit of statutory good time credits (U. S. C., Title 18, Section 710), he will be released in July 1938 (R. 52).

## SUMMARY OF ARGUMENT

Petitioner and his codefendant waived the right to counsel under the facts here presented. They had counsel from the day after arrest until they discharged him shortly before the trial, ~~when~~ not wishing to follow his advice to plead guilty. At the trial the judge asked them if they had counsel, to which they replied in the negative. He then asked them if they were ready for trial, to which they replied in the affirmative. Thereafter, the codefendant acted as counsel for both.

The Sixth Amendment imposes no duty on the trial court to proffer the services of counsel when the accused indicate no desire for assignment of counsel in ordinary circumstances in non-capital cases. Pertinent language in all the Federal cases that mention the right to counsel point to this conclusion, and it is the law in all of the twenty-two States which have ruled on the question under their constitutions.

Even if error was committed, it did not deprive the court of jurisdiction and render the judgment and sentence a nullity, so as to subject it to collateral attack on habeas corpus.

## ARGUMENT

### I

### THE RIGHT TO COUNSEL WAS NOT DENIED UNDER THE FACTS OF THE INSTANT CASE

The petitioner contends that the failure of the court to assign counsel for him at his trial for possessing and uttering counterfeit money deprived him of his constitutional rights under the Fifth and Sixth Amendments, and that it therefore followed that his conviction was a nullity and he was entitled to be released on habeas corpus. Since it is not contended that the due process clause has been violated except in so far as it involves the right to counsel, and since such right is specifically pledged by the Sixth Amendment, it would avail nothing to discuss separately this right under the Fifth and Sixth Amendments.

#### A. *The circumstances in this case constituted a waiver of the right to the assistance of counsel*

The Sixth Amendment provides that: "the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Clearly the constitutional right to counsel is one which an accused may exercise or fail to exercise at his discretion. It is a personal privilege and

may be waived. The Court has made the point clear in *Schick* v. *United States,* 195 U. S. 65, 72:

> Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.

The *Schick case,* it is true, involved a petty offense, but in 1930 this Court, quoting its language as above set out, held that there is no distinction between the right to waive constitutional privileges in trials for petty offenses and the right to waive them in trials for felonies. *Patton* v. *United States,* 281 U. S. 276. Cf. *Reynolds* v. *United States,* 98 U. S. 145. Thus it is clear that rights guaranteed by the Fifth and Sixth Amendments may be waived, and waivers have been inferred from the action or inaction of the accused in the following cases: *Diaz* v. *United States,* 223 U. S. 442; *Powers* v. *United States,* 223 U. S. 303; *Trono* v. *United States,* 199 U. S. 521; *Fitzpatrick* v. *United States,* 178 U. S. 304; *Wilson* v. *United States,* 162 U. S. 613; *Brown* v. *Walker,* 161 U. S. 591; *Worthington* v. *United States,* 1 F. (2d) 154 (C. C. A. 7th); *Phillips* v. *United States,* 201 Fed. 259 (C. C. A. 8th). Cf. *Frank* v. *Mangum,* 237 U. S. 309; *Snyder* v. *Massachusetts,* 291 U. S. 97, 120–121.

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The highest courts of many states have held that the assistance of counsel is not essential to the validity of the trial, but is a privilege which may be waived. See Appendix A, *infra*, pp. 48–73.

The case of *Powell* v. *Alabama*, 287 U. S. 45, cannot be construed as holding that the right to counsel may not be waived. There this Court sent the case back to the state court for further trial, and held that in a capital case and in the peculiar circumstances of the case, failure to make an effective appointment of counsel was a violation of the due process clause of the Fourteenth Amendment. The decision is not authority for the proposition that a court must appoint counsel in all cases. Its authority extends only to capital cases under similar circumstances. See *Palko* v. *Connecticut*, 302 U. S. 319. Any contention that the case of *Powell* v. *Alabama* is applicable here disregards the following language employed by the Court therein to restrict its decision to the special and extraordinary circumstances there presented (pp. 71–72):

> In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think

the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. *Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine.*[4] All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; * * *. In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel. * * *

The duty of the trial court to appoint counsel under such circumstances is clear, as it is clear under circumstances such as are disclosed by the record here; * * *.

[4]All italics are added, unless otherwise indicated.

In contrast with each of the circumstances emphasized by the Court in *Powell* v. *Alabama* as its reasons for holding that effective assistance of counsel was a necessary element of due process in that case, the evidence in the case at bar points to opposite circumstances. (1) The offense of which petitioner and his codefendant were tried and convicted was not a capital offense. (2) The court room was free from any hostile element. On the contrary, the record demonstrates that the officials in charge of the trial were meticulous in protecting the interests of the prisoners. As the District Court stated in denying the first petition for habeas corpus (13 F. Supp. 253, 256):

> There is no evidence or claim that the judge was hostile or prejudiced or swayed by any improper influence, such as that of a mob or of a dominating hostile public opinion, but, on the other hand, it clearly appears that he did not know either of the defendants, that he did not proceed with the trial until after both petitioners had announced that they were ready for trial, and that he did not conduct their case differently from other cases of like kind.

(3) There was no evidence before the trial court that petitioner and his codefendant were unable to employ counsel. On the contrary, they did employ counsel who represented them at the Commissioner's examination and consulted with them in jail a number of times thereafter up to approximately a

week before the trial. These facts make it apparent that they were well aware of their right to counsel and refute any claim of prejudice to their rights in not being informed of such right to counsel. (4) The evidence indicates and the courts below found in effect (R. 67, 69) that they were capable of making their own defense. On behalf of both, petitioner's codefendant cross examined prosecution witnesses and the defendants were furnished a witness at their request. One of them took the stand, and Bridwell, the codefendant, addressed the jury in summation. There is no evidence in the record and no claim in the petition for habeas corpus that professional counsel could have procured any witnesses or taken any steps which would have availed petitioner any advantage he did not have. There is no evidence from which a presumption can be raised that professional counsel would have made a motion for a new trial or appealed the conviction in the case.

Differences in the facts were held in *Shores* v. *United States,* 80 F. (2d) 942 (C. C. A. 9th), certiorari denied, 297 U. S. 705, to render the rule of *Powell* v. *Alabama* inapplicable. There the trial court ordered the trial to proceed, appointing the attorney of one of the codefendants to serve the defendant, although the defendant had requested a continuance on the ground that his counsel was incapacitated. The defendant was convicted of mail fraud and the Circuit Court of Appeals, by

a divided court, held that the absence of his own counsel was not reversible error. The opinion, citing at length the circumstances in the *Powell* case, makes the following distinctions, among others, similar to those in the case at bar (p. 946):

> * * * First, the appellant was not ignorant or illiterate * * * Second, there were no circumstances of public hostility * * * Fifth, he was not in deadly peril of his life. The case was not a capital one. Sixth, according to his own affidavit, appellant was able to employ an attorney who had represented him for at least two years. Seventh, * * * During this period we may assume from the appellant's affidavit as to such employment that he had been advised by counsel not only as to his rights in the premises, but also as to the defense he intended to interpose upon the trial and as to the witnesses it would be necessary to present that defense * * *.

Similarly, where a state judge had declined to assign counsel at the defendant's request, and defendant was tried without counsel, a United States District Court said, after reviewing the facts of the *Powell* case (*Wilson* v. *Lanagan*, 19 F. Supp. 870, 873 (Mass.)):

> None of these facts are present in the case at bar except that Wilson's mother was in California, although his wife was with him in the jail on the Saturday before his trial

and in the court at time of trial. This single instance of similarity is not enough to warrant this court, on the facts of this case, in adopting the conclusions of the court in the Powell case.

An examination of the State decisions discussing *Powell* v. *Alabama* reveals that the rule of that decision has been limited to capital cases involving circumstances analogous to those presented in that case. Thus, even in capital cases, *Powell* v. *Alabama* has been distinguished on its facts [5] more fre-

[5] *People* v. *Francis*, 356 Ill. 74. In this case as in the *Powell* case the defendants were negroes, illiterate, and charged with capital crime. But the court emphasized (at p. 79) that "The *Powell* case was tried amidst tense conditions, with State militia protecting the accused, while the trial of the defendant [here] was apparently free from any disturbing or prejudicial influence." *State* v. *Breeding*, 220 Iowa 605: Here counsel was appointed immediately before the defendant entered a plea of guilty to a murder charge on which he was sentenced to the death penalty. The sentence was affirmed, with dissent based on the *Powell* case. *State* v. *Whitfield*, 206 N. C. 696, certiorari denied, 293 U. S. 556: Counsel was appointed at the arraignment two days before trial. The defendant was convicted of rape and sentenced to death in a one-day proceeding. The *Powell* case was distinguished and the conviction affirmed. *Brown* v. *State*, 173 Miss. 542, 563, reversed on other grounds, 297 U. S. 278: Counsel was appointed the afternoon before trial and was given no access to the prisoner until the time of trial. The conviction was affirmed by the state supreme court, with vigorous dissents based on the *Powell* case. See also *Commonwealth* v. *Millen*, 289 Mass. 441, certiorari denied, 295 U. S. 765.

quently than it has been found applicable.[6] In non-capital cases *Powell* v. *Alabama* has been distinguished by state courts.[7]

Since it is evident that *Powell* v. *Alabama* is inapplicable here, the general rule that the privilege of counsel may be waived is applicable. The Government believes that the facts gleaned from a consideration of the whole record establish such a waiver.

The undisputed facts indicating a waiver are that petitioner and Bridwell had counsel at the Commissioner's hearing and until approximately one week before trial; that they declined to follow his advice to plead guilty; that they discharged him from the case; that they appeared without counsel; that the court read to them the indictment, to which

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[6] *Fugate* v. *Commonwealth*, 254 Ky. 663 (appointment of counsel day before trial); *Busby* v. *State*, 177 Miss. 68 (appointment two days before trial). See also *Dumas* v. *State*, 54 Okla. Cr. Rep. 207.

[7] *House* v. *State*, 177 So. 705, 707 (Fla. 1937); *State* v. *Van Vlack*, 65 P. (2d) 736, 746 (Idaho, 1937); *Commonwealth* v. *Mangan*, 200 N. E. 911 (Mass. 1936); *Prescott* v. *State*, 56 Okla. Cr. Rep. 259; *State* v. *Fairclough*, 86 Utah 326; *Tucker* v. *Commonwealth*, 159 Va. 1038; *State* v. *Bradley*, 175 Wash. 481. In *Commonwealth* v. *Richards*, 111 Pa. Sup. 124 (cited in petitioner's brief, p. 14), the court cited *Powell* v. *Alabama* in reversing a conviction of a defendant in a non-capital case who went to trial unrepresented because the counsel he had employed was not informed of the trial and the judge failed to appoint one. But it is to be observed that the rule in Pennsylvania was the same before the decision of this Court in the *Powell* case. See discussion *infra*, p. 67–68.

they entered a plea of not guilty; that the court asked them if they had counsel, to which they replied in the negative; that the court then asked them if they were ready to proceed to trial, to which they replied they were; that thereafter Bridwell, acting for himself and petitioner, conducted the defense, objected to and cross-examined the Government's witnesses, suggested the need of an expert witness, who was called and testified, took the stand on defense, and addressed the jury; and that no step was taken toward an appeal for some months.

Even from their own testimony it is clear that petitioner and Bridwell well understood their rights and it would have been superfluous to inform them of their right to counsel. They employed an attorney for nearly two months after their arrest, and this fact was known to officials in court (R. 24, 32). It may be assumed, as said in *Shores* v. *United States,* 80 F. (2d) 942, 946, *supra,* "* * * that he had been advised by counsel not only as to his rights in the premises, but also as to the defense he intended to interpose upon the trial and as to the witnesses it would be necessary to present that defense * * *." They discharged their counsel after declining to take his advice to plead guilty. There is nothing in the record to show that such advice was not sound. So far as any allegation, argument, or testimony in these proceedings indicates, the situation was simply that two marines in possession of $500 of spurious currency and

charged with uttering $80 of it with no evidence to offer in contradiction or explanation of such possession and uttering desired to exercise their right to be tried, but there is nothing to indicate that an experienced lawyer would not have viewed such a trial as futile. As was said in *Dietz* v. *State,* 149 Wis. 462, 480:

> It does not seem at all within the range of possibilities that any attorney could have made the facts of this case which point towards the defendant's guilt appear any less convincing. Were it a case where the evidence was scanty and the conclusions doubtful, a different question might possibly be presented.

The inference must be that they decided to go to trial without counsel. After announcing they had no counsel and were ready for trial, an able and alert defense was made. Of Bridwell's speech to the jury, brief though it was, it may well be said, as it was in the *Dietz* case, *supra,* at p. 479:

> An argument of this nature by a man whose liberty is hanging in the balance may well appeal to an American jury with greater force than the argument of a skilful lawyer.

When the verdict was returned, it was received without objection or inquiry as to the probability of an appeal (R. 21-22). No claim has ever been made that there was any ground of defense that could have been better prepared and presented by counsel, that any witnesses existed who could have helped

the defense, that there was any ground for a new trial or appeal, or that any evidence was negligently omitted which might have been produced. It must be concluded that petitioner and Bridwell advisedly and intelligently chose to dispense with counsel and to present what they had in the nature of defense without counsel.

The petitioner's argument that an express waiver was required is based on the fact that in *Patton* v. *United States,* 281 U. S. 276, the petitioner had expressly waived a full jury of twelve. Petitioner's contention confuses the function of a jury in the judicial process with the personal privilege of the assistance of counsel.

That there is a marked distinction between the requisites of waiver of a jury trial and those of the waiver of privileges granted solely for the benefit of the accused is clear from a review of the decisions of this Court and other Federal courts. In the *Patton* case, *supra,* at p. 312, it was said that the part played by a jury in the judicial process is of such importance that not only must the defendant expressly waive it but that the court and Government must join. In contrast, privileges granted solely for the benefit of the defendant are not of the same integral importance to the judicial process—are not similar integral elements thereof—and may be waived by acts of commission or omission which raise an inference of waiver. Thus, failure to demand a speedy trial waives the

right. *Worthington* v. *United States,* 1 F. (2d) 154 (C. C. A. 7th); *Phillips* v. *United States* 201 Fed. 259 (C. C. A. 8th). The right of an accused against self-incrimination is waived by his taking the stand as a witness, though he is without counsel and is not advised of his right by the court. *Powers* v. *United States,* 223 U. S. 303; *Fitzpatrick* v. *United States,* 178 U. S. 304; *Wilson* v. *United States,* 162 U. S. 613; *Brown* v. *Walker* 161 U. S. 591. The right not to be placed in double jeopardy is waived by appealing from the judgment of conviction. *Trono* v. *United States,* 199 U. S. 521. The right of an accused to be confronted with the witnesses against him is waived by his voluntarily absenting himself from the courtroom. *Diaz* v. *United States,* 223 U. S. 442. It is not a denial of due process to hold that the privilege of being personally present at the verdict is waived by failure of counsel to state such absence as a ground for new trial. *Frank* v. *Mangum* 237 U. S. 309.

It was testified by petitioner and Bridwell at the hearing on the application for habeas corpus that they requested counsel in court before the trial and were told by the United States Attorney that counsel was not appointed in such cases in South Carolina. It was further testified that after the trial a request for counsel was made by the prisoners in the jail. This testimony is refuted as to the demand in court by the United States Attorney, the Assistant United States Attorney and by the clerk of the court in which the trial was had, and as to

the demand in jail by the jailer. It is fundamental, of course, that a prisoner seeking relief by habeas corpus is required to allege and prove the facts establishing the illegality of his detention. By virtue of this rule, when taken in connection with the presumption attending the validity of the judgment and sentence, it follows that in the instant case much more was required than the testimony of the interested codefendants to overcome the testimony given by the Government officials, who were officers of the court, that the codefendants had not made a request for counsel. See *Holden* v. *Minnesota,* 137 U. S. 483, 491–492. This is all the more true as the testimony of the Government officials on all other features of the trial coincides with that of the codefendants. Thus the Court is not required to accept the testimony of the codefendants as true, and it must be taken as established that no request for counsel was made.

Every court which has ruled on situations corresponding to that presented in the instant case has held that such facts constitute a waiver of the constitutional right to counsel.[8] *Wilson* v. *Lanagan,*

[8] For cases which, while not expressly holding such facts to constitute a waiver, hold that no duty lies on the trial court to proffer counsel in the absence of a request, see the rules in Alabama, *infra*, p. 48; Illinois, *infra*, p. 53; Iowa, *infra*, p. 55; Kansas, *infra*, p. 56; Massachusetts, *infra*, p. 60; Michigan, *infra*, p. 61; Mississippi, *infra*, p. 62; Montana, *infra*, p. 64; Nevada, *infra*, p. 65; South Carolina, *infra*, p. 68; Texas, *infra*, p. 68; Virginia, *infra*, p. 71; Utah, *infra*, p. 70.

19 F. Supp. 870 (Mass.); *Perkins* v. *Sheriff*, 23 F. (2d) 892 (La.); *Weatherford* v. *State*, 76 Fla. 219; *Gatlin* v. *State*, 17 Ga. App. 406; *Marovich* v. *State*, 202 Ind. 274; *Grogan* v. *Commonwealth*, 222 Ky. 484; *Holland* v. *Commonwealth*, 241 Ky. 813; *State* v. *Kelly*, 25 La. Ann. 381; *State* v. *Terry*, 201 Mo. 697; *State* v. *Raney*, 63 N. J. Law 363; *State* v. *Yoes*, 67 W. Va. 546; *State* v. *Kellison*, 56 W. Va. 690; *James* v. *State*, 27 Wyo. 378; *United States* v. *Go-Leng*, 21 Phil. Rep. 426.

In summary we submit that the constitutional right to the assistance of counsel may be waived, that such waiver may be implied from the circumstances of the case, and that the facts in this case did so constitute a waiver.

*B. The Sixth Amendment imposes no duty on a trial court to appoint counsel of its own motion in the absence of a request.*

If all the other circumstances indicating a waiver of the right to counsel are ignored, petitioner's failure to request counsel and his announcement of readiness for trial without counsel suffice to refute the contention that the right to counsel was denied.

A trial court is not required by the Sixth Amendment to appoint counsel of its own motion, in the absence of a request and showing of inability to employ counsel, in a non-capital felony case under routine circumstances when defendants in response to the court's questions state that they have no counsel and are ready to proceed to trial.

The Sixth Amendment was not intended to impose any such duty on the trial judge. Its purpose was to preserve in the Federal system the right of accused persons to defend in person or by counsel which had been previously guaranteed by the colonies in derogation of the English common law. *Powell* v. *Alabama*, 287 U. S. 45, 60–65; 1 Cooley's *Constitutional Limitations*, 8th ed., 698 et seq.; and see *Patton* v. *United States*, 281 U. S. 276, 307. Directed against the injustice of the common law denial of such right, the purpose of the provision could hardly be construed to impose on the trial judge the obligation of taking affirmative action to insure that a defendant had counsel.

The first ten Amendments to the Constitution were proposed by Congress in September 1789 (1 Stat. 97).[9] A few months later, and while the Sixth Amendment was before the States for ratification, the Act of April 30, 1790,[10] was passed, providing that a person accused of treason or other capital offense should be allowed to defend by counsel and that the court should "* * * immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire." The enactment of this

[9] The debates on the proposal which became the Sixth Amendment disclose nothing relevant to the present question. 1 Debates in Cong. (O. S.) 784–785.

[10] 1 Stat. 112, 118, c. 9, Sec. 29 (U. S. C., Title 18, Sec. 563; R. S. 1034). No debate on the bill is reported. 1 Debates in Cong. (O. S.) 976–977, 1141; 2 Debates in Cong. (O. S.) 1572–1574.

statute during the pendency of the ratification of the Sixth Amendment indicates that Congress did not understand the Amendment to require trial courts to undertake to assign counsel in any case even on request, else the statute would have been superfluous.

This statute unamended remains the only enactment on the subject. It confines to capital cases the duty of the trial judge to assign counsel to a defendant, and then only "upon his request." The manifest import of the statute is that in non-capital cases no duty of assignment is imposed.

However, though denying that it was intended by the constitution or statute to impose any duty of assignment in non-capital cases, the Government recognizes that the practice has become established on the part of bench and bar to see that those defendants shall not go unrepresented who, being indigent and not electing to defend in person, make a timely request and showing for assignment of counsel.[11] 1 Cooley's *Constitutional Limitations,* 8th ed., 700. Moreover, the Government concedes that the better practice is to assign counsel

[11] Counsel is not entitled to compensation from the Government for services rendered on assignment by a federal court. *Nabb* v. *Lawless's Case,* 1 Ct. Cl. 173. The rule is the same in nearly all the states. See cases collected in 36 L. R. A. (N. S.) 377. Bills to provide defenders at government expense in the District of Columbia and federal district courts were introduced at the last session of Congress but were never reported out by the Judiciary Committees, H. R. 3154, H. R. 3155, S. 2027, S. 2028, 75th Cong., 1st Sess.

in the absence of an express waiver.[12] But that such practice, salutary and wise as it may be, is required by the Sixth Amendment certainly does not follow, for, as this Court has said, "Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis* v. *Parker,* 187 U. S. 606, 609), wherever the good life is a subject of concern." *Snyder* v. *Massachusetts,* 291 U. S. 97, 122.

Not only is no express duty to assign counsel in the absence of a request imposed by the Constitution or by statute, but no such requirement is found in the decisions. The only statement that it is the duty of the court, whether requested or not, to assign counsel is found in *Powell* v. *Alabama, supra,* 287 U. S. at 71, a decision meticulously limited to its facts. We believe none of the decisions of this Court, of the lower federal courts, or of the state appellate courts have construed that decision as requiring an assignment in routine circumstances in the absence of a request.

In *Wilson* v. *Lanagan,* 19 F. Supp. 870 (Mass.), *supra,* p. 23, which arose on habeas corpus, it appeared (p. 871) that the petitioner Wilson had requested a State trial court to assign counsel for him. The justice replied that since it

[12] See Department of Justice Circular No. 2946, set out in Appendix II, *infra,* p. 74, issued after the present proceeding was instituted and designed to prevent a recurrence of the situation.

was not a capital case he had no authority to do so, but he offered to instruct the sheriff to communicate with any available attorney whom Wilson might name. Wilson then asked for a continuance in order that he might communicate with his mother, who was in California. After inquiries, made of Wilson and the sheriff, the trial justice concluded that Wilson had not been deprived of an opportunity to get counsel, if he had wanted to do so, and refused his request for further continuance. Wilson then conducted his own trial. The District Court found nothing to indicate the trial was not conducted in an orderly and proper manner and with due regard for the rights of the accused, and denied habeas corpus, saying (p. 873):

> *Powell* v. *Alamaba*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, is authority for the proposition that due process not only includes the right to be represented by counsel employed by defendant, but adequate time for preparation of his defense; and in capital cases it includes the duty to assign counsel if defendant is not otherwise represented. It will be noted, however, that the duty to assign was expressly limited to capital cases.

In *Shores* v. *United States*, 80 F. (2d) 942, 945 (C. C. A. 9th), *supra*, p. 15, the court said:

> We have only to consider the facts in *Powell* v. *State of Alabama* to disclose the

contrast between the situations presented in the two cases.

In addition to these cases distinguishing *Powell* v. *Alabama* on its facts, no language is found in the federal cases extending the rule there enunciated to a requirement that the court assign counsel of its own motion in all cases. Cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 128; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243; *Brown* v. *Mississippi*, 297 U. S. 278, 286; *Palko* v. *Connecticut*, 302 U. S. 319; *Roberts* v. *Anderson*, 66 F. (2d) 874, 876 (C. C. A. 10th) *Thomas* v. *District of Columbia*, 90 F. (2d) 424, 428 (App. D. C.); *Downer* v. *Dunaway*, 1 F. Supp. 1001, 1002–1003 (Ga.); *Louie Yung* v. *Coleman*, 5 F. Supp. 702, 703 (Idaho); *In Re Ades*, 6 F. Supp. 467, 476 (Md.).

Of *Powell* v. *Alabama*, the Court said in *Palko* v. *Connecticut*, *supra*, "The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing." In *Roberts* v. *Anderson*, *supra*, the court said, citing *Powell* v. *Alabama*, "The right to a hearing includes the right to the assistance of counsel of his own choice, *if requested.*" *Downer* v. *Dunaway*, *supra*, followed the *Powell* case because of similar circumstances of mob dominance.

In *In Re Ades*, *supra*, the court said, "It was held in *Powell* v. *Alabama* * * * that the right of the accused at least in a capital case to have the aid of counsel for his defense is one of the funda-

mental rights guaranteed by the due process clause of the Fourteenth Amendment, and that *in such a case, where the defendant is unable to employ counsel,* it is the duty of the court, whether requested or not, to assign counsel for him * * *."

Not only is it apparent therefore that there is nothing in *Powell* v. *Alabama* or the decisions following it which supports the contention that in routine cases the Constitution requires an assignment of counsel without a request, but it may be pointed out that examination of earlier decisions of this Court fails to reveal the suggestion of such rule. In *Cooke* v. *United States,* 267 U. S. 517 (cited in *Powell* v. *Alabama*), this Court said of a hearing in a federal court on a charge of contempt committed outside the presence of the court (p. 537): "We think this includes the assistance of counsel, *if requested.*" In *Andersen* v. *Treat,* 172 U. S. 24, habeas corpus was denied a person convicted of murder in a federal court, despite the circumstances that his attorney was not permitted to see him in jail; that the accused made a self-incriminating statement at the Commissioner's hearing without advice of counsel; and that the accused was not permitted to have his own counsel and was represented at the trial by an attorney appointed by the court. In *In Re Jugiro,* 140 U. S. 291, this Court denied habeas corpus to a person convicted of murder and sentenced to death by a New York court. The accused had requested coun-

sel and the court assigned counsel who was not admitted to practice and who failed to take the exceptions necessary to appeal from the judgment of conviction. Cf. *Ashe* v. *United States,* 270 U. S. 424. In *Patton* v. *United States,* 281 U. S. 276, 308, the court quotes with approval language from *Hack* v. *State,* 141 Wis. 346, to the effect that failure to ask for a privilege constitutes a waiver of it.

The decisions in the lower federal courts prior to the *Powell* case point in the same direction. In *Perkins* v. *Sheriff,* 23 F. (2d) 892 (La.), habeas corpus was sought on the ground that the state trial court did not appoint counsel, no request having been made, and imposed sentence without affording an opportunity for a motion for new trial. The writ was denied.

In *Urban* v. *United States,* 46 F. (2d) 291 (C. C. A. 10th), the court held that the federal trial court committed no prejudicial error by empaneling a jury in the absence of the defendant's counsel. See to same effect *Paoni* v. *United States,* 281 Fed. 801 (C. C. A. 3rd). In *Hagan* v. *United States,* 9 F. (2d) 562 (C. C. A. 8th), it was held that a physician's affidavit alleging insanity of counsel representing the defendant at the trial did not constitute sufficient evidence to afford ground for reversal. In *United States* v. *Rosenstein,* 34 F. (2d) 630 (C. C. A. 2d), the court held that denial of a continuance to enable new counsel to acquaint himself with the case was not an abuse of the trial court's dis-

cretion. In *Crouch* v. *United States,* 298 Fed. 437 (C. C. A. 6th), it was held that denial of a continuance on the ground that the defendant's counsel was engaged in trial elsewhere and that defendant was represented only by counsel appointed by the court at the trial was not reversible error. The court said (p. 440): "The result would not rightly have been different, had counsel originally retained conducted the defense." In *Henry Ching* v. *United States,* 264 Fed. 639 (C. C. A. 9th), certiorari denied, 254 U. S. 630, the defendant stated he wanted to discharge his counsel and asked for a few days to get another, and counsel asked to be excused, but the court appointed him in spite of this, and it was held not to constitute prejudicial error.

Nothing in the cases of *Dillingham* v. *United States,* 76 F. (2d) 36 (C. C. A. 5th); *Downer* v. *Dunaway,* 53 F. (2d) 586 (C. C. A. 5th), or *Ex Parte Riggins,* 134 Fed. 404 (Ala.) is contrary to the conclusion herein reached. In the *Dillingham* case, the judgment of the District Court was reversed on the insufficiency of the evidence and on what the appellate court described as a "complete abandonment of all trial safeguards" and a "denial of all constitutional rights." In *Downer* v. *Dunaway,* the granting of habeas corpus was directed by a divided Circuit Court of Appeals in a situation similar to and fully as aggravated as that presented in *Powell* v. *Alabama.* In the *Riggins* case, the court merely stated, by way of illustration, that it

would not be due process for a state to "deprive a person of the benefit of counsel" (p. 418).

Hearings in which aliens seeking admission to this country were not informed of their right to the aid of counsel have been held to constitute fair hearings by this and other courts. *Quon Quon Poy* v. *Johnson,* 273 U. S. 352; *Ex Parte Ching Hing,* 224 Fed. 261 (Wash.); *Buccino* v. *Williams,* 190 Fed. 897 (N. Y.). In *Ex Parte Chin Loy You,* 223 Fed. 833 (Mass.) (cited in *Powell* v. *Alabama*) it was held that in a deportation proceeding a "request for counsel seasonably made" should be granted. See also to the same effect *Ex Parte Iwata,* 219 Fed. 610 (Calif.).

Thus, it is seen that nothing in the federal cases, either after or before *Powell* v. *Alabama,* imposes on the trial judge the duty of assigning counsel in the absence of a request.

Since there is no federal decision on the exact question of whether the Sixth Amendment requires an assignment of counsel in the absence of a request, we believe that the construction on the question under the state constitutions by the state courts assumes particular importance. All the states guarantee to accused persons by their constitutions the right to defend themselves in person or by counsel. These state constitutional guarantees are similar to the Sixth Amendment. The appellate courts of 22 states have ruled on the question whether a trial court must assign counsel even

though no request is made. They have uniformly held that no such duty is imposed on the trial court. In a few states it has been held that there is no duty at all to assign counsel even on request, and denial of the request for an assignment has been held not to constitute reversible error. Some state jurisdictions require considerably more than a request, such as a showing of inability to employ counsel, even in capital cases. The survey of State law which is summarized here and set out in full as Appendix A, *infra,* pp. 48–73, shows a remarkable clearness and uniformity of decision upon the necessity of a request before the trial court must appoint counsel.

Typical and representative of the language of the decisions in the state courts on factual circumstances similar to those presented here are the following excerpts. In *People* v. *Lavendowski,* 326 Ill. 173, 176, it was said:

> The constitutional provision * * * does not place upon the court the duty to proffer the services of counsel.

And in *Holland* v. *Commonwealth,* 241 Ky. 813, 817:

> Although it is true that the Constitution guarantees to the accused in all criminal prosecutions the right to be heard by himself and counsel, it is not the duty of the court to assign counsel to the accused unless he requests it, and shows that he is financially unable to employ counsel, or lacks sufficient

> mental capacity to conduct the defense, or to understand its nature.

And in *Gatlin* v. *State,* 17 Ga. App. 406, 408:

> Where the defendant, as in this case, in answer to a query from the court, states that he has no counsel, and in answer to another question from the court replies that he is ready for trial, and makes no request for counsel to be appointed to defend him, but, on the contrary, actively enters into the case as his own lawyer, agreeing upon a jury, cross-examining the witnesses, and making his own statement to the jury, he waives his right to be represented by counsel.

In *Weatherford* v. *State,* 76 Fla. 219, 223, it was said:

> * * * the mere failure of the trial judge to ask the accused if he desired counsel or was unable to employ counsel to represent him in the case, or to inform him that he had a right to be represented by counsel, or that the court would appoint counsel to represent him if he so desired, does not show a deprivation of any right secured to the accused by law; * * *

*State* v. *Raney,* 63 N. J. Law 363, 365, uses this language:

> The right and privilege is not denied by mere failure to assign counsel.

As said in *State* v. *Yoes,* 67 W. Va. 546, 547:

> The right to have counsel is a mere privilege guaranteed by the constitution. * * *

> No invasion of this guaranty is disclosed, therefore, unless a request for the assistance of counsel appears by the record to have been denied by the court.

As said in *James* v. *State,* 27 Wyo. 378, 384:

> The right, or privilege, to defend by counsel, * * * may be waived or renounced, and it is not denied by a mere failure to assign counsel. There is no invasion of it disclosed, unless it appear by the record that a request for the assignment of counsel was denied by the court.

As said in *State* v. *Steelman,* 318 Mo. 628, 631:

> * * * before appointing or assigning counsel for a defendant charged with a felony the trial court must find three things: first, that the defendant is without counsel; second, that he has requested the court to appoint counsel for him; and, third, that *he is unable to employ counsel.* [Italics in original.]

Thus we believe there is persuasive authority in the federal decisions and overwhelming authority in the decisions of the 22 states which have ruled clearly on the question to support our position that the rule is thoroughly well-established in this country that the right to the assistance of counsel is not denied an accused unless he satisfies the court of his indigence and makes a request for an assignment of counsel, and unless such request is denied by the court.

To hold that the Sixth Amendment requires an offer to assign counsel when a defendant, as in this case, appears without counsel and announces himself ready for trial, would involve a suggestion that the states have been uniformly mistaken in the construction of their own constitutions. The further question would arise whether the uniform practice as reflected by the reported decisions satisfies the requirements of due process. Petitioner's contention, if adopted, would confuse the practice in state courts of misdemeanor as well as felony jurisdiction.

If his contention were established as a rule of law, it would be difficult to deny its applicability to unrepresented defendants who announce their readiness to plead guilty to the charges against them. From this it would logically follow that confessions could not be heard by officers without their offering to procure counsel, or at least that such confessions would be inadmissible in evidence. These procedural changes, which logically would be required by the rule sought by the petitioner, are far afield from the scope of the judicial function.

## II

### IF ERROR WAS COMMITTED, IT DID NOT DIVEST THE TRIAL COURT OF JURISDICTION AND CANNOT BE REACHED BY HABEAS CORPUS

We submit that in any event the question sought to be raised by petitioner cannot be presented in a habeas corpus proceeding. We recognize that if it

be assumed that the constitutional rights of petitioner were denied, to confine him to a remedy by appeal might work hardship in the circumstances of this case, where the error complained of is the failure of the court to assign counsel. Nevertheless it is believed that the decisions of this Court establish the principle that the petitioner has no remedy by habeas corpus.

It is elementary that the writ of habeas corpus may only be employed when there is absence of jurisdiction and the power to sentence in the trial court. To render habeas corpus applicable, the defect must render the trial proceedings a nullity. As said by Mr. Chief Justice Marshall in *Ex Parte Watkins,* 3 Pet. 193, 202:

> An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous.

It is equally well established that irregularities occurring in the trial proceedings cannot be reviewed on habeas corpus and that the writ cannot be made the substitute for an appeal. The defect which may be reached, by habeas corpus must render the trial and judgment void, not merely voidable. *Ex Parte Parks,* 93 U. S. 18; *Ex Parte Reed,* 100 U. S. 13; *Ex Parte Clarke,* 100 U. S. 399; *Ex Parte Harding,* 120 U. S. 782; *In Re Jugiro,* 140 U. S. 291; *Matter of Moran,* 203 U. S. 96; *Kaizo* v. *Henry,* 211 U. S. 146; *Harlan* v. *Mc-*

*Gourin,* 218 U. S. 442; *Collins* v. *Johnston,* 237 U. S. 502; *Frank* v. *Mangum,* 237 U. S. 309.

A constitutional violation in itself does not render the judgment and sentence void. In order for habeas corpus to be an appropriate remedy the circumstances must be such that the court proceeded to trial and judgment without jurisdiction.

In *Riddle* v. *Dyche,* 262 U. S. 333, the Court denied habeas corpus sought on the ground that petitioner's conviction in a federal court was by a jury of eleven men. The trial judge had refused to amend the record to show the fact that there were but eleven jurors and had refused an offer of proof. This Court had held, before the habeas corpus proceeding, that it could not compel the amendment of the record by mandamus, *Ex Parte Riddle,* 255 U. S. 450, and that the remedy was by writ of error, though the record did not show such error. It will be noted that habeas corpus was denied in this case before *Patton* v. *United States,* 281 U. S. 276, 293, had overruled the following language of *Thompson* v. *Utah,* 170 U. S. 343, 353, referring to the Constitution:

> The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

The *Patton* case itself points out that a constitutional privilege does not necessarily go to jurisdiction (p. 298):

> Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. * * *.
>
> But the question remains whether the court is empowered to try the case without a jury; that is to say, whether Congress has vested jurisdiction to that end.

In *In Re Belt*, 159 U. S. 95, the Court held that habeas corpus would not issue to review the judgment of the lower court upholding the constitutionality of an Act permitting waiver of a jury in criminal cases in the District of Columbia since the lower court had jurisdiction.

In the case of *In Re Jugiro*, 140 U. S. 291, the appellant claimed that he had been deprived of his constitutional right of counsel in that the person assigned at his trial was not an attorney licensed to practice, and through the ignorance of such unlicensed attorney no exceptions were taken and his appeal had been dismissed (123 N. Y. 630), because of the absence of such exceptions in the record. Though no other relief was available, the Court held (140 U. S. at 296, 297):

> The alleged assignment, at the trial of appellant, of one as his counsel who (although he may have been an attorney at law) had not been admitted or qualified to practise as an attorney or counsellor at law in the courts of New York; * * * were all matters occurring in the course of the pro-

> ceedings and trial in a court of competent jurisdiction * * *. The errors, if any, committed by that court in respect to any of those matters, did not affect its jurisdiction of the offence or of the person accused, and cannot be reached by *habeas corpus.*

In *Anderson* v. *Treat,* 172 U. S. 24, the Court denied habeas corpus to a person convicted of murder in a federal court where his employed attorney was not permitted to consult with or represent him, where as a consequence he made a statement at the Commissioner's hearing without the advice of his retained counsel, and where at the trial he was represented by an assigned counsel not of his choosing. The Court had affirmed the conviction without that point being raised, apparently because it did not appear in the record. 170 U. S. 481. The Court denied habeas corpus, though no further appeal on the constitutional question remained.

In *Frank* v. *Mangum,* 237 U. S. 309, the petitioner's right to be personally present at the verdict had been waived by his counsel and the state court had held that counsel's failure to make such involuntary absence at the verdict a ground in the motion for new trial operated as a permanent waiver of the right. This Court denied habeas corpus though no method remained to obtain relief from such denial of a recognized right.

In *Ex Parte Harding,* 120 U. S. 782, the petition for habeas corpus alleged that the accused was denied the right of compulsory process for obtaining

witnesses under the Sixth Amendment. Of this the Court said (120 U. S. at 783–784):

> This court has no jurisdiction for the discharge on habeas corpus of a person imprisoned under the sentence of a territorial court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence * * *. For such errors or irregularities, if they exist, a judgment is not void, and a writ of habeas corpus gives this court no authority for their correction.

In *Ex Parte Parks,* 93 U. S. 18, the petition for habeas corpus alleged that the petitioner was convicted in a federal court of an offense which he alleged was not a crime under the laws of the United States. This Court said (93 U. S. at 23):

> But if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error * * *.
>
> But, in the case before us, the District Court had plenary jurisdiction, both of the person, the place, the cause, and everything about it. To review the decision of that court by means of the writ of *habeas corpus* would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court.

Allegations in the petition for the writ of habeas corpus that petitioner's rights under the Fifth

Amendment had been infringed by a territorial court were involved in *Matter of Moran,* 203 U. S. 96. The Court, speaking through Mr. Justice Holmes, said (203 U. S. at 105):

> Finally it is contended that the petitioner was compelled to be a witness against himself, contrary to the Fifth Amendment, because he was compelled to stand up and walk before the jury, and because, during a recess, the jury was stationed so as to observe his size and walk. If this was an error, as to which we express no opinion, it did not go to the jurisdiction of the court.

In *Felts* v. *Murphy,* 201 U. S. 123, the Court denied habeas corpus though the petitioner was so deaf he had not heard a word of the trial proceedings and so poor he could not have taken an appeal.

Petitioner relies upon the cases of *Hans Nielsen, Petitioner,* 131 U. S. 176; *Moore* v. *Dempsey,* 261 U. S. 86; and *Mooney* v. *Holohan,* 294 U. S. 103.

None of these cases alters the rule limiting habeas corpus to judgments rendered without jurisdiction. All are cases in which constitutional rights were disregarded in such a way as to render the trial a nullity and to deprive the trial court of jurisdiction.

As to cases of the type of *Moore* v. *Dempsey,* it would seem almost sufficient to quote the language of Mr. Justice Holmes, speaking for the Court in reversing an order granting habeas corpus

in *Ashe* v. *United States,* 270 U. S. 424, 426:

> Extraordinary cases where there is only the form of a court under the domination of a mob, as was alleged to be the fact in *Moore* v. *Dempsey,* 261 U. S. 86, offer no analogy to this.

There is nothing in the normal judicial proceedings had in the trial court below which corresponds to the extraordinary facts presented in *Moore* v. *Dempsey,* described by this Court as follows (pp. 89–90):

> The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defense although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.

Even allegations of mob domination and the presence of military forces have been held insufficient to invoke the authority of cases like *Moore* v. *Dempsey*. *Bard* v. *Chilton*, 20 F. (2d) 906 (C. C. A. 6th), certiorari denied, 275 U. S. 565; *Dunn* v. *Lyons*, 23 F. (2d) 14 (C. C. A. 5th), certiorari denied, 276 U. S. 622.

In *Hans Nielsen, Petitioner, supra,* the defendant was convicted and sentenced for unlawful cohabitation and later for the same acts was indicted for adultery, to which he entered a plea of double jeopardy. This Court, following its previous decision of *In Re Snow,* 120 U. S. 274, held that the first indictment covered the whole offense, and that the second indictment for the same offense, as it placed the defendant in double jeopardy, bestowed no jurisdiction on the court. In no way did the court in the *Nielsen* case depart from the established rule, as it said (131 U. S. at 185):

> * * * the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court. * * *.

In *Mooney* v. *Holohan, supra,* the Court stated that the existence of the following facts would constitute denial of due process (294 U. S. at 112):

> * * * if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving

> a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.

A writ repeatedly limited to situations so extraordinary that a court loses jurisdiction surely is not available to set aside a judgment on a petition which, though skilfully prepared, fails to allege one instance of prejudice except that petitioner and his codefendant were permitted to defend in person, a right they certainly had. To hold with petitioner here would overrule the well-established rule that error, even though it effected grievous prejudice, even though it allegedly involved constitutional privileges and even though all other avenues of review were precluded by such error, is not reviewable on habeas corpus.

What was said by the Court in *Snyder* v. *Massachusetts,* 291 U. S. 97, 122, in connection with the Fourteenth Amendment is equally pertinent to the Sixth Amendment:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to a local law, and set the guilty free.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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MARCH 1938.

# APPENDIX A

Appendix A contains a survey of the decisions of State speaking on the subject are here listed: of the trial judge to assign counsel in the absence of a request.

For the convenience of the Court, the pages upon which are begun the discussions of law of each State speaking on the subject are here listed:


| State: | Page | State: | Page |
|---|---|---|---|
| *Alabama | 48 | *New Jersey | 65 |
| Arkansas | 50 | New York | 66 |
| California | 50 | North Dakota | 67 |
| *Florida | 51 | Ohio | 67 |
| *Georgia | 52 | Oklahoma | 67 |
| *Illinois | 53 | Oregon | 67 |
| *Indiana | 54 | Pennsylvania | 67 |
| *Iowa | 55 | *South Carolina | 68 |
| *Kansas | 56 | South Dakota | 68 |
| *Kentucky | 57 | *Texas | 68 |
| *Louisiana | 59 | *Utah | 70 |
| *Massachusetts | 60 | Vermont | 70 |
| *Michigan | 61 | *Virginia | 71 |
| Minnesota | 62 | Washington | 71 |
| *Mississippi | 62 | *West Virginia | 72 |
| *Missouri | 62 | Wisconsin | 72 |
| *Montana | 64 | *Wyoming | 73 |
| Nebraska | 65 | *Philippine Islands | 73 |
| *Nevada | 65 | | |


The jurisdictions starred have held directly on the point.

No pertinent decisions are found in the states not listed.

*Alabama.*—The rule in Alabama is that no duty, constitutional or moral, lies with the trial court to appoint counsel for indigents except in capital cases, and it remains unaffected by *Powell* v. *Ala-*

*bama. Green* v. *State,* 170 So. 72 (Ala. App. 1936), certiorari denied, 233 Ala. 49; *Bethune* v. *State,* 26 Ala. App. 72, certiorari denied, 228 Ala. 422. It will be noted that both cases followed the decision of this Court in *Powell* v. *Alabama,* though they do not cite it. In *Green* v. *State,* the court said (p. 73):

> * * * the law makes no provision to furnish counsel to any person accused of crime unless charged with a capital offense, and is unable to employ counsel.

and in *Bethune* v. *State* it is said (p. 73):

> It is also insisted that the trial court erred in not appointing counsel for these two defendants because they were charged with a felony, were unlearned, and did not have money to employ a lawyer to represent them. There is no merit in this insistence. The court is under no legal duty to appoint counsel in any case unless the accused has been indicted for a capital offense and it is made known to the court he is unable to employ counsel.

Of the effect of *Powell* v. *Alabama,* the Court of Appeals later said (*Gilchrist* v. *State,* 173 So. 649, 650 (Ala. App. 1937)):

> And, in view of the discussion by Mr. Justice Sutherland, in the opinion on certiorari to the Supreme Court of Alabama, in the case of *Ozie Powell et al.* v. *State of Alabama,* 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, we are persuaded that the wiser, at least safer, course, would be for the trial court to appoint counsel for defendants charged with felonies, who are unable to employ counsel, in all cases.
>
> * * * * *

> True, we cannot reverse the judgment of conviction because of the fact that appellant had not benefit of counsel on his trial. *Bethune et al.* v. *State, supra.*

Of this, the Supreme Court said, in denying certiorari, 173 So. 651:

> * * * we must not be understood as approving, or as giving our full assent to, all that is said by the Court of Appeals with reference to the appointment, by trial courts, of "counsel for defendants charged with felonies, who are unable to employ counsel, in all cases." No such duty rests upon trial courts. The statute only requires that such courts shall appoint counsel for a defendant who is indicted for a capital offense, and who is unable to employ counsel. Code, Sec. 5567; *Campbell* v. *State,* 182 Ala. 18, 62 So. 57. This has been the extent of the duty enjoined upon trial courts, with respect to appointment of attorneys for defendants, since the earliest history of the State. The rule has worked reasonably well, and we can see no good reason for advising a departure from it at this time. We are not impressed that the time has come when defendants charged with felonies, not capital, shall have attorneys ad litem appointed for them.

*Arkansas.*—In Arkansas, a trial court is required by statute to inquire if counsel is desired. *Ruloff* v. *State,* 142 Ark. 477. Of course, counsel may be waived. *Williams* v. *State,* 153 Ark. 289. (Cited by petitioner, Brief, p. 14.)

*California.*—In California, the trial court is required by statute to inquire of an indigent defendant if he wishes the court to appoint counsel.

*People* v. *Crowley,* 13 Cal. App. 322. In a case preceding such mandatory statute, the Supreme Court suggested that the duty to assign was only a moral duty. *People* v. *Goldenson,* 76 Cal. 328. The accused may waive the right. *People* v. *Northcott,* 209 Cal. 639; *People* v. *Mayfield,* 85 Cal. App. 77; *People* v. *Rose,* 42 Cal. App. 540. But the waiver need not be expressed and may be inferred. *People* v. *Cortze,* 108 Cal. App. 111. At preliminary examination, waiver is inferred from failure to request counsel. *People* v. *Crowley,* 13 Cal. App. 322; see also *People* v. *White,* 17 Cal. App. 486. And a court which refused a continuance sought on the ground that defendant's attorney was out of the State and offered to appoint an attorney, whom the defendant refused insisting on his right to his own attorney, was held not to have committed error. *People* v. *Russell,* 156 Cal. 450.

*Florida.*—In Florida, facts almost identical to those of the present case were presented to the Supreme Court. *Weatherford* v. *State,* 76 Fla. 219. The trial court asked if the defendant had counsel; on his reply in the negative the court asked if he was ready for trial, to which he replied he was. The Supreme Court said (p. 223):

> It does not appear that the assistance of counsel was "desired by" the accused; and the mere failure of the trial judge to ask the accused if he desired counsel or was unable to employ counsel to represent him in the case, or to inform him that he had a right to be represented by counsel, or that the court would appoint counsel to represent him if he so desired, does not show a deprivation of any right secured to the accused by law; nor

> does this omission alone show erroneous or harmful procedure.

*Powell* v. *Alabama* applies "in certain cases." *House* v. *State,* 177 So. 705, 707 (Fla. 1937).

*Georgia.*—In Georgia another exact duplicate of the present case was presented in the findings of the appellate court. *Gatlin* v. *State,* 17 Ga. App. 406, 407:

> Upon the call of the case the defendant, who was at large under bond, appeared, and the court asked him whether he had counsel to represent him. The defendant stated that he did not have counsel. The court then asked him if he was ready for trial, and the defendant replied that he was; and the court instructed him to strike a jury. The defendant accepted the jury list handed to him, and stated that the first twelve men were acceptable to him. The court failed to appoint counsel to represent the defendant, and failed to instruct him as to his constitutional right to the benefit of counsel, and failed to ask him if he wanted counsel to represent him. * * * it appears that when the court asked him if he was ready for trial, he replied in the affirmative, and proceeded to defend himself, acting as his own counsel; and the record shows that he cross-examined the witnesses with at least ordinary ability and intelligence * * *.

Of these facts, the court held, 407–408:

> The right and privilege of one accused of crime to be defended by counsel is not denied by a mere failure of the court to assign counsel, when it does not appear that counsel is wanted. * * * Where the defendant, as in this case, in answer to a query from the

> court, states that he has no counsel, and in answer to another question from the court replies that he is ready for trial, and makes no request for counsel to be appointed to defend him, but, on the contrary, actively enters into the case as his own lawyer, agreeing upon a jury, cross-examining the witnesses, and making his own statement to the jury, he waives his right to be represented by counsel. While the better practice for the court, on ascertaining that the accused has no counsel, is to ask him if he is able to employ counsel, and if he desires the benefit of counsel, and to acquaint him with his constitutional right in this respect, yet, under the particular facts of this case, and in the absence of any constitutional provision or statute requiring the court to do so, the omission of the court in this respect is not cause for a new trial.

In *Cook* v. *State,* 48 Ga. App. 224, 225 (cited by petitioner, Brief p. 14) the court found that "the evidence in this case was circumstantial; and it was especially important that the defendant have counsel," and ordered a new trial, but in *Bailey* v. *State,* 50 Ga. App. 92, *Cook* v. *State* was distinguished on its facts and *Gatlin* v. *State* was reaffirmed as the rule in Georgia. *Reliford* v. *State,* 140 Ga. 777 (cited by petitioner, Brief, p. 14), is an earlier case in which a defendant in a murder case was forced to trial over objection ten minutes after counsel was appointed and does not relate to the question here.

*Illinois.*—The rule that assignment of counsel is not required in the absence of a request and showing, in spite of a statute requiring assignment

to indigents, is established by *People* v. *Lavendowski,* 326 Ill. 173, 176:

> Section 9 of article 2 of the constitution provides, in part, as follows: "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." Section 2 of division 13 of the Criminal Code provides that "every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense," etc.
>
> The constitutional provision that a person charged with crime shall have the right to appear and defend by counsel, and the provision of the statute that he shall be allowed counsel or the same shall be appointed for him upon his statement, under oath, that he cannot procure such assistance, does not place upon the court the duty to proffer the services of counsel, * * *

In a decision rendered after but not citing *Powell* v. *Alabama,* it was presumed "that the judge hearing this case in the municipal court did not deny a request for the services of counsel", *People* v. *Parcora,* 358 Ill. 448, 451, though the petitioner alleged that he was ignorant of his rights, asked the court for and was denied an opportunity to secure counsel, and was forced to go to trial unrepresented. *Powell* v. *Alabama* is distinguishable on its facts even in capital cases. *People* v. *Francis, supra,* p. 17.

*Indiana.*—The rule in Indiana requiring that a request and showing must be made before the court has the duty of appointing counsel, is established in *Marovich* v. *State,* 202 Ind. 274, 277, where the

defendant stated before the trial that he could not get a lawyer and at the close of the evidence asked for a lawyer, saying, "If I get a lawyer, I can present everything to the court." The Supreme Court held:

> It is admitted in appellant's brief that he acted as his own lawyer, and conducted the trial of his case, and that he made no objection save as here shown. If his statement was sufficient request, had it been made before the trial, to warrant the appointment by the court of a lawyer to defend him at the expense of the State, such request having been made at the close of the evidence in defense, it comes too late.

The earlier cases of *Batchelor* v. *State,* 189 Ind. 69, *Bielich* v. *State,* 189 Ind. 127, and *Cassidy* v. *State,* 201 Ind. 311 (all cited by petitioner, Brief, p. 14; petitioner erroneously cites the *Bielich* case as an Illinois case), represent no authority contrary to the rule of the *Marovich* case, *supra,* and are not adverted to in it. The *Batchelor* and *Bielich* cases reversed judgments imposing a death sentence after the defendants had entered guilty pleas and made judicial confessions without either being advised of their rights or the consequences of their pleas and after repeated requests for counsel had been ignored by the officers who had them in custody. In the *Cassidy* case the judge told the defendant he should have a lawyer but that one would not do him any good and proceeded to question him in violation of his right against self-incrimination.

*Iowa.*—Here the rule is clear that the constitutional guarantee requires an assignment only on request, and that under the statute a showing must

be made. *Korf* v. *Jasper County,* 132 Iowa 682, 685.

> The Constitution guaranties to every person accused of crime, involving his life or liberty, the assistance of counsel. * * * But such assistance cannot be forced upon any one not desiring it, nor is the court required to appoint counsel save upon request. * * *
>
> An analysis of the statute discloses that counsel is to be assigned to assist the defendant, upon three conditions only: (1) When the accused is without counsel; (2) When unable to employ counsel; and (3) Upon the request of the defendant.

*Kansas.*—That a request and showing are required for assignment by the Constitution and by statute of Kansas is indicated in *State* v. *Moore,* 61 Kan. 732, 734:

> In order that the accused may have the full benefit of this fundamental right, the legislature has provided that when he is about to be arraigned upon a charge of felony, and is without counsel and unable to employ any, it is the duty of the court to appoint counsel to conduct his defense, upon request.

See to same effect *Salina* v. *Cooper,* 45 Kan. 12. The constitutional rule is stated more clearly in a dissenting opinion in the recent case of *State* v. *Oberst,* 127 Kan. 412, 433.

> The constitutional right of the accused to have the assistance of counsel may be waived and a waiver will be implied where the accused, being without counsel, fails to demand that counsel be assigned to him. * * *
>
> There must be a request for, and a denial of, counsel shown to constitute error. A denial will not be presumed.

The majority opinion did not hold to the contrary but held that under the circumstances a boy of 17 should not be permitted to plead guilty to a murder charge without advice as to his rights. The majority admitted (p. 424):

> Without approving or condemning the practice of accepting a plea of guilty on miscellaneous charges of crime without advice of counsel, we can see how mature criminals who know quite well what they are about may be permitted to do so; * * *.

*Kentucky.*—In Kentucky there is no statute on the subject and the decisions are based entirely on the state constitution. The situation as to the law is therefore quite analogous to the instant case and the facts cited by the Supreme Court in the cases hereinafter quoted are strikingly analogous to the facts presented in the case at bar. Therefore, the decisions in Kentucky holding that no duty is imposed on a trial judge to appoint counsel in the absence of a request and showing are persuasive as to the applicable law here. In *Grogan* v. *Commonwealth,* 222 Ky. 484, 485, the court said:

> Usually the court is not required to assign counsel to the accused unless he requests it and shows that he is financially unable to employ counsel. * * * The record is silent as to what occurred when appellant undertook to conduct his own defense * * *. He displayed considerable ability in interrogating the witnesses, and there is no showing whatever that he was so mentally deficient or so ignorant of his rights as to require the interposition of the court in his behalf. In the absence of such a

showing, or of a request for counsel, we cannot say that the court erred in not appointing counsel.

In *Holland* v. *Commonwealth,* 241 Ky. 813, 817–818, an even more recent case, the court said:

> * * * Although it is true that the Constitution guarantees to the accused in all criminal prosecutions the right to be heard by himself and counsel, it is not the duty of the court to assign counsel to the accused unless he requests it, and shows that he is financially unable to employ counsel, or lacks sufficient mental capacity to conduct the defense, or to understand its nature. *Grogan* v. *Commonwealth,* 222 Ky. 484, 1 S. W. (2d) 779. The record does not disclose what occurred when appellant undertook to conduct his own defense. For aught that appears, he may have stated that he did not desire counsel. At any rate, he elected to conduct his own defense. Doubtless it is true that appellant's ability was not equal to that of a well-trained lawyer, but not only did he cross-examine the witnesses as to his own identity and the identity of the money taken from the bank, but he had sufficient intelligence and assurance to argue his own case to the jury, and there is no showing whatever that he was so mentally deficient or so ignorant of his rights as to require the interposition of the court in his behalf. In the absence of such a showing, or a request for counsel, we cannot say that the court erred in not appointing counsel. The case is simply one where the accused, being a man of at least average intelligence, as disclosed by the record, elected to conduct his own defense, and therefore will be held bound by his election. Furthermore, it is not possible to perceive how the jury could have reached

> a different verdict if appellant had employed, or the court had appointed, the best attorney in the state to defend him, and he had assisted in the selection of the jury, had subjected the witnesses to the severest cross-examination, and had succeeded in excluding the confession.

*Cass* v. *Commonwealth,* 236 Ky. 462 (cited by petitioner, Brief, p. 14), was a capital case in which counsel was refused time to prepare the defense. The court is under the duty to assign counsel in capital cases. *Fugate* v. *Commonwealth,* 254 Ky. 663 (citing *Powell* v. *Alabama*).

*Louisiana.*—The law in Louisiana is equally clear. In *State* v. *Davis,* 171 La. 449, 451, the court said:

> It is true the Constitution declares that in all criminal prosecutions the accused shall enjoy the right to have counsel to assist him in his defense, but it has never been considered the mandatory duty of the court to provide counsel for an accused where he has not secured counsel for himself and has made no request for the court to assign him counsel.

That this is the rule even though a statute requires the assignment of counsel on the defendant's request is held in *State* v. *Satcher,* 124 La. 1015, and *State* v. *Williams,* 162 La. 590. In the former the court said (p. 1020): "* * * the court was under no obligation to make the assignment until the request had been made." See to the same effect *State* v. *Murry,* 165 La. 653; *State* v. *De Sarrant,* 33 La. Ann. 979; *State* v. *Whitesides,* 49 La. Ann. 352. This rule is recognized by *Perkins* v. *Sheriff,* 23 F. (2d) 892 (D. C. La.), where the court said:

"* * * the Supreme Court of Louisiana has held that the court does not have to appoint counsel unless asked for by the accused; * * *" That the failure to request an assignment constitutes a waiver was held in *State* v. *Kelly,* 25 La. Ann. 381, in which the court said (p. 382):

> * * * inasmuch as when brought to the bar in the custody of the sheriff, as appears from the record, he was ready for his trial, we must presume that if he had no counsel, and did not ask the court to assign him one, he chose to be heard in his own defense.

*Massachusetts.*—Here, there is no applicable statute except in capital cases (Gen. Laws, 1932, Ch. 277, Sec. 47). That the Massachusetts Constitution, which preserves to the accused the "* * * right * * * to be fully heard in his defence by himself or his counsel, at his election * * *" (Mass. Const., 1780, Part I, Art. 12), does not require an assignment is held in *McDonald* v. *Commonwealth,* 173 Mass. 322, and *Conant* v. *Burnham,* 133 Mass. 503, 506. In the former case the court said (p. 327):

> * * * there is no constitutional provision in this State guaranteeing counsel to a prisoner, and no statutory provision in respect to counsel except in the case of an indictment for a capital crime.

To same effect see *Commonwealth* v. *Millen,* 289 Mass. 441 (citing *Powell* v. *Alabama*), certiorari denied, 295 U. S. 765. This rule was recognized by a federal court, *Wilson* v. *Lanagan,* 19 F. Supp. 870 (D. C. Mass.), where the court said (pp. 872–873):

> If every criminal trial, held without the aid of a defendant's attorney, is a want of due

process, then the established practice in this Commonwealth would have to be materially revised.

*Michigan.*—This State has a statute which permits the court to appoint counsel at public expense for an indigent defendant. But even with such a statute the Supreme Court has held that neither the Constitution nor the statute imposes an obligation to appoint counsel in the absence of a request. In *People* v. *Williams,* 225 Mich. 133, 137–138, the court said:

> An accused is not entitled, as of right, to have counsel assigned by the court to advise him relative to his plea. The State Constitution, art. 2, § 19, secures to an accused the right "to have counsel for his defense." This does not mean he shall have counsel at public expense. It is a guaranty of right to employ and have counsel; * * * This is * * * on a par with the right to produce witnesses and proofs * * * Section 15912, 3 Comp. Laws 1915, permits the court to appoint an attorney at public expense to conduct the defense of an accused when he is unable to procure counsel. This statute is permissive; its provisions require a showing of inability of an accused to procure counsel, * * * The record discloses no application by defendants for counsel during the period their pleas of not guilty stood, or at any other time, and there is no merit in the claim that counsel should have been appointed to represent them.

Again in a recent case the court held, *People* v. *Crandell,* 270 Mich. 124, 127:

> The law affords an accused the benefit of counsel if he so desires; of his own selection

if employed by him, and by the court if he is without means and so requests.

*Minnesota.*—Here, a statute requires that the court may not receive a plea of guilty unless the accused is represented by counsel and if he has no counsel the court must appoint one (Gen. Stat. 1923, Sec. 10667). In *State* v. *McDonnell,* 165 Minn. 423, 426, the court held that the statute was substantially complied with when a 17-year-old boy entered a plea to a felony charge in the following manner (p. 425):

> The court: Have you any attorney?
> The defendant: No, sir.
> The court: Do you wish to have one, or are you ready to enter a plea?
> The defendant: To plead.

*Mississippi.*—The rule here is that the constitution imposes no duty to assign counsel. *Reed* v. *State,* 143 Miss. 686, 689, in which the court held:

> It is not the law that the state must furnish counsel to persons charged with crime, except in capital cases. In all other cases the defendant must procure counsel or act for himself in his trial. The court has no power to employ counsel to be furnished him.

To the same effect see *Dugan* v. *State,* 151 Miss. 781. Cf. *Schwartz* v. *State,* 103 Miss. 711; *Brown* v. *State,* 173 Miss. 542, reversed, 297 U. S. 278.

*Missouri.*—Under a statute that requires assignment of counsel to an indigent defendant, the rule of Missouri is that not only must a request be made but a showing of inability to employ counsel. *State* v. *Steelman,* 318 Mo. 628; *State* v. *Miller,* 292 S. W.

440 (Mo. Sup.); *State* v. *Terry,* 201 Mo. 697; *State* v. *Moore,* 121 Mo. 514. In the first case the court held (pp. 631–632):

> * * * before appointing or assigning counsel for a defendant charged with a felony the trial court must find three things: first, that the defendant is without counsel; second, that he has requested the court to appoint counsel for him; and third, that *he is unable to employ counsel.* * * * While, as above indicated, it is shown by the record in this case that appellant was without counsel and, also, that he requested the court to appoint council for him, the record fails to show that *he was unable to employ counsel.* * * * Being able to employ counsel, it was not the duty of the court to appoint counsel for him, even though he did request it. [Italics in original.]

That a failure to make the request constitutes a waiver of the right is held in *State* v. *Terry, supra* (pp. 700–701):

> Section 2560, Revised Statutes 1899, provides: "If any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours."
>
> It will be noticed from this statute that three things are necessary to be found by the trial court before appointing or assigning counsel for a defendant charged with felony: first, that the defendant is without

> counsel; second, that he is unable to employ counsel; third, that the defendant has requested that counsel be appointed for him. This record does not show that defendant requested the court to appoint counsel for him, but it does disclose that the court found that he was able to employ counsel. Defendant being able to employ counsel, it was not the duty of the court to appoint counsel for him, even though he had requested it. Besides, his failure to make such a request was a waiver of his statutory right.

*Montana.*—The rule here is that a request for counsel must be denied to constitute a violation of the constitutional right, *State* v. *Fowler,* 59 Mont. 346, where the court said (pp. 353–354):

> * * * the defendant stated that he was without counsel to defend him. The court explained to him that he had had ample time to obtain counsel and he must proceed with the trial.
>
> It will be noted that the defendant did not ask time to procure counsel, but merely stated that he was without counsel. Under the circumstances we do not think the court deprived him of any constitutional right, as counsel contends. * * * The Constitution guarantees every defendant the right to be heard by himself, as well as by counsel. * * * The right to appear by counsel is a personal privilege to be availed of by the accused at his pleasure, * * *
>
> Under these circumstances we think nothing short of a refusal of an application to the court by the defendant for time to procure counsel, disclosing a substantial reason why he has not done so, would be a sufficient reason to justify a conclusion that

the court has violated his constitutional rights.

*Nebraska.*—No cases on the exact point are found in Nebraska but it is clear that the constitutional right to counsel may be waived. *Bordeau* v. *State,* 125 Neb. 133; *Smythe* v. *State,* 124 Neb. 267.

*Nevada.*—In Nevada it was held that the denial of requests repeatedly made at and during the trial was not error, when the defendant had waived counsel at the arraignment some period earlier. *State* v. *MacKinnon,* 41 Nev. 182. The court said (pp. 187–188):

> The purpose of this provision in our constitution is simply to guarantee to one charged with crime the privilege of being defended by counsel. * * * If he waives it at one stage of the proceeding, he must act with a reasonable degree of diligence if he later desires to avail himself of it. * * * * * * The defendant had ample opportunity to engage counsel, and his failure to do so was due to his own neglect.

*New Jersey.*—In New Jersey the rule is that there is no denial of the constitutional right to counsel unless the record affirmatively shows the denial of a request. *State* v. *Raney,* 63 N. J. Law 363; *State* v. *Murphy,* 87 N. J. Law 515. In the former case the court said (p. 365):

> The right and privilege in question in this case is thus capable of being waived. In the absence in the record and proceedings of any indication that the accused desired the assistance of counsel and was denied it, it will be presumed that he failed to ask that counsel be assigned for his defense, and chose to defend himself. The right and

> privilege is not denied by mere failure to assign counsel.

*New York.*—In New York no decision has been found on analagous circumstances. However, a decision which preceded any statutes in that state on the subject indicates that the *right* to assign counsel does not flow from any *authority* or *duty* imposed by the constitution. *Hadley* v. *Albany County,* 28 How. Prac. 22, 24, in which the court said:

> I have not been able to find any statute of this state, which under the most liberal construction, directs or even authorizes the court to assign counsel to defend prisoners, or that provides any compensation, or prescribes any mode of payment for such service. It was insisted upon the argument that such authority was to be found in the constitution of this state. The seventh article and seventh section of the constitution provides as follows: "And in every trial on impeachment or indictment, the party accused *shall be allowed counsel as in civil actions.* The obvious construction of this provision is, that a prisoner may have the assistance of counsel in conducting a defence, not that the court shall provide such counsel at the expense of the county. [Italics in original.]

That the right to assign counsel is established by practice is seen in *People Ex Rel. Saunders* v. *Supervisors of Erie County,* 1 Sheld. (N. Y.) 517, 524. In a late case the following language is found, *People* v. *Price,* 262 N. Y. 410, 413, affirmed 263 N. Y. 617:

> Where, therefore, a defendant upon arraignment or at any other stage of the proceeding, * * * appears without counsel

and desires the aid of counsel, the court must assign an attorney to defend him.

*North Dakota.*—No case on the exact question is found in North Dakota. In two cases, however, the Supreme Court affirmed denials of applications to withdraw pleas of guilty to charges of murder made after waiver of counsel. *State* v. *Throndson,* 49 N. D. 348; *State* v. *Layer,* 48 N. D. 366.

*Ohio.*—In Ohio an assigned attorney refused to serve, whereupon the defendant acted for himself. The appellate court held that the trial court should have appointed another counsel on the grounds that the defendant was mentally defective. *Stephenson* v. *State,* 4 Ohio App. 128, 129 (Cited by petitioner, Brief, p. 14).

*Oklahoma.*—In Oklahoma it is required by statute that the court must ask an unrepresented defendant if he desires the aid of counsel. (Comp. Stat. 1921, Sec. 2590); *Cerday* v. *State,* 39 Okla. Cr. Rep. 153; *Polk* v. *State,* 26 Okla. Cr. Rep. 283; *Baker* *State,* 9 Okla. Cr. Rep. 62. Cf. *Ex Parte Hollins,* 54 Okla., Cr. Rep. 70; *Dumas* v. *State,* 54 Okla. Cr. Rep. 207; *Prescott* v. *State,* 56 Okla. Cr. Rep. 259, 268, distinguishing *Powell* v. *Alabama.*

*Oregon.*—An Oregon statute requires that a defendant be informed of his constitutional rights at the arraignment. A judgment and sentence to the death penalty, largely obtained through a confession taken by a deputy District Attorney who declined a request for counsel made by the accused before he confessed, was affirmed. *State* v. *Butchek,* 121 Ore. 141. The Court held that the statute did not apply to officials.

*Pennsylvania.*—This is the only State which, in the absence of statute, requires that an accused be

advised of his right to counsel. The cases cited by petitioner (Brief, p. 14) are to that point. *Commonwealth* v. *Cohen*, 123 Pa. Super. 5; *Commonwealth* v. *Valerio*, 118 Pa. Super. 34; *Commonwealth* v. *Richards*, 111 Pa. Super. 124 (the latter of which cited *Powell* v. *Alabama*). No cases are found on the specific question whether counsel must be assigned in the absence of request.

*South Carolina.*—The rule in South Carolina is clear. The Supreme Court said in the recent case of *State* v. *Jones*, 172 S. C. 129, 130:

> Neither of the appellants was represented by counsel, and, under the law, it was not required by the Court to assign counsel for them.

*South Dakota.*—In South Dakota the court is required by statute to inform an accused of his right to counsel and to ask if he desires the aid of counsel. Rev. Code, 1919, Sec. 4755. Of the constitutional provision, however, the court said, in denying an appeal from an order denying an application for assignment of counsel to take an appeal from a judgment of conviction, *State* v. *Sweeney*, 48 S. D. 248, 251:

> Section 7 of article 6 of our Constitution merely means that the prisoner may have the assistance of counsel in conducting his defense, not that the court shall provide such counsel at the expense of the county.

*Texas.*—In Texas in a non-capital case there is no duty to assign counsel even on the defendant's request. *Gilley* v. *State*, 114 Tex. Cr. App. 548; *Brady* v. *State*, 122 Tex. Cr. App. 275. In the latter case the court said (p. 278):

> He was not charged in the indictment with an offense which could be punished by the infliction of the death penalty, and for that reason the court was not required by law to appoint counsel for him.

In *Faggett* v. *State*, 122 Tex. Cr. App. 399, 403, the court said:

> In a felony case less than capital, the law does not make the presence of an attorney essential. It recognizes the right of the accused to be represented by counsel, but imposes upon him the duty of using diligence in securing representation.

To the same effect see *Holden v. State,* 89 Tex. Cr. App. 628; *Cooke v. State,* 95 Tex. Cr. App. 553; *Cummings* v. *State,* 104 Tex. Cr. App. 117; *Brown* v. *State,* 118 Tex. Cr. App. 582. The language of the court in *Sowells* v. *State,* 99 Tex. Cr. App. 465, 468, in holding that no prejudice resulted to the defendant from the absence of an attorney, is applicable to the instant case:

> In a felony case of less than capital, the law does not make the presence of an attorney essential. It recognizes the right of the accused to be represented by counsel, but it imposes upon him the duty of using diligence in securing their services. In the motion there is nothing revealing what would have been done had the attorney been present other than that which was done. * * * No suggestion is made in the motion of any evidence that might have been produced in his favor. Neither does it show that any improper evidence against him was received. As we comprehend it, a reversal is sought solely because the appellant was not represented by an attorney. This position this court cannot sanction.

See to same effect *Fuller* v. *State*, 117 Tex. Cr. App. 558. Even in a capital case where a statute provides for an assignment of counsel, the court held in *Ex Parte Rodriquez*, 118 Tex. Cr. App. 179, 181:

> However, even in capital cases no imperative duty to appoint counsel is upon the trial court, and it only becomes his duty when the court is apprised of the fact that the accused is too poor to employ counsel.

See to the same effect *McKee* v. *State*, 118 Tex. Cr. App. 479.

*Utah*.—Here, although there is a statute requiring assignment of counsel on the request of an indigent defendant (Comp. Laws, 1917, Sec. 8871), the Supreme Court has held that the right thus given is not constitutional. In *Pardee* v. *Salt Lake County*, 39 Utah 482, 488, the court said:

> It may be said, therefore, that there is at least no constitutional warrant for appointing an attorney to defend in criminal cases.

See *State* v. *Fairclough*, 86 Utah 326, distinguishing *Powell* v. *Alabama* on its facts, particularly in that it applied to a capital case.

*Vermont*.—The only case in Vermont involves an effort on the part of a defendant to invoke the statute providing for compensation of assigned counsel by an affidavit alleging his indigence. *State* v. *Gomez*, 89 Vt. 490, 496, in which the court said:

> The claim of respondent's counsel that under Article 10 of the Constitution of Vermont it was the duty of the court to assign counsel at the State's expense is without merit.

*Virginia.*—The rule is established in Virginia that even in a capital case where the sentence is to the death penalty, the record must show an affirmative denial by the court of the right to counsel before it will be held that the constitutional right has been violated. In *Barnes* v. *Commonwealth*, 92 Va. 794, 803, where a woman was convicted and sentenced to be hanged, the court said:

> The record does not show whether she had counsel or not; but if it showed that she did not have counsel, unless it appeared that she was denied that right, it would not be ground for reversing the judgment. * * *
>
> If a prisoner is unable to employ counsel, the court may appoint some one to defend him, * * *. But we cannot presume that the trial court denied the prisoner her right to have counsel, * * *

In *Riddick* v. *Commonwealth*, 135 Va. 724, 727, where the defendant, who was convicted of murder and sentenced to the death penalty, contended on appeal that he had had no counsel below and alleged prejudice from such lack of assistance, the court followed the rule of *Barnes* v. *Commonwealth, supra*, saying (p. 727):

> The accused was confined * * * for many months, in which he and his friends might have secured counsel and ordered subpoenas for witnesses in his behalf.
>
> * * * It is not contended that the accused was *denied* the right to have counsel. [Italics in original.]

*Washington.*—No case is found in this State on the exact question. See *State* v. *Bradley*, 175 Wash. 481, denying the applicability of *Powell* v. *Alabama*; *State* v. *Hardung*, 161 Wash. 379; *Presby* v. *Klickitat County*, 5 Wash. 329.

*West Virginia.*—In West Virginia a ruling on the exact question is found in a case factually analogous to the case at bar. In *State* v. *Yoes,* 67 W. Va. 546, 547, the court said:

> The order shows no appearance by attorney and yet it says both parties announced themselves ready for trial. Hence it is clear, not only that she appeared in her own proper person, but also that she appeared for the purposes of the trial.
>
> * * * The right to have counsel is a mere privilege guaranteed by the constitution. * * * No invasion of this guaranty is disclosed, therefore, unless a request for the assistance of counsel appears by the record to have been denied by the court.

See to the same effect *State* v. *Kellison,* 56 W. Va. 690, 692–693, a murder case. Withdrawal of the plea of guilty made without the advice of counsel was denied in *State* v. *Hill,* 81 W. Va. 676, and *State* v. *Stevenson,* 67 W. Va. 553.

*Wisconsin.*—There is no clear rule on the question in Wisconsin. In *Hopper* v. *Ashland County,* 84 Wis. 655, the Circuit Court held that it had no jurisdiction to appoint counsel on the application of an indigent defendant. The Supreme Court did not rule on such power, but held that the appointment in that case was not sufficiently clear to render the expense of defense counsel a charge against the county. It had been previously held in *Carpenter* v. *Dane,* 9 Wis. 274, 278, and *County* v. *Smith,* 13 Wis. 585, that even in the absence of a statute the county was obligated to pay counsel assigned for defendants clearly indigent. A defendant in a murder case was held bound by his waiver of counsel in *Dietz* v. *State,* 149 Wis. 462, 479–480.

*Wyoming.*—The rule is clear in Wyoming that the court is not required to assign counsel in the absence of a request. It was established in *James* v. State, 27 Wyo. 378, 384, that:

> The right, or privilege, to defend by counsel, * * * may be waived or renounced, and it is not denied by a mere failure to assign counsel. There is no invasion of it disclosed, unless it appear by the record that a request for assignment of counsel was denied by the court.

*Philippine Islands.*—That no assignment is required in the absence of a request is held in *United States* v. *Go-Leng,* 21 Phil. Rep. 426, 428–429:

> * * * Accused persons are undoubtedly entitled to appoint an attorney to defend them at trial, or to have one appointed *de officio,* should they ask for one and not possess the necessary means to employ an attorney of their own. But it devolves exclusively upon them to avail themselves of this right. It is one which they are perfectly entitled to waive and they may defend themselves in person. The law expressly authorizes them, as it could not but do, to defend themselves in person, without the assistance of counsel. (Sec. 15, General Orders, No. 58.) It is understood, of course, that they waive their right to be assisted by counsel when they not only do not appoint or request one, but voluntarily submit to trial, and especially when they actually exercise therein the right of defense by cross-examining the witnesses for the prosecution and by introducing evidence in their own behalf, as was done in the present case.

## APPENDIX B

DEPARTMENT OF JUSTICE,
*Washington, D. C., March 4, 1937.*

CIRCULAR NO. 2946

*To all United States attorneys:*

Certain cases have arisen recently indicating that in some instances the District Courts do not appoint counsel for defendants in criminal cases who appear without an attorney, unless the defendant expressly requests such appointment. In most of the Districts, however, it is customary to appoint counsel in each case in which the defendant has not retained counsel, unless he expressly states that he wishes to conduct his own defense.

It would seem that the latter procedure is the better practice. When in any given case such practice is not followed, you are directed to bring the matter to the attention of the court, in order that the defendant may have the assistance of counsel for his defense. In the case of *Powell* v. *Alabama*, 287 U. S. 45, the Court said:

> The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

These words would apply with equal force to the Fifth Amendment. While it may be that the right "to have the assistance of counsel for his defense," which is guaranteed by the Sixth Amendment, may be waived, and while it may be that the practice followed in most of the jurisdictions is more than

a compliance with the constitutional requirement, the Department of Justice is under a particular obligation to see that no man who needs counsel is without such assistance.

HOMER CUMMINGS,
*Attorney General.*

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# SUPREME COURT OF THE UNITED STATES.

No. 699.—October Term, 1937.

| | |
|---|---|
| John A. Johnson, Petitioner, *vs.* Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. |

[May 23, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner, while imprisoned in a Federal penitentiary, was denied *habeas corpus* by the District Court.[1] Later, that court granted petitioner a second hearing, prompted by "the peculiar circumstances surrounding the case and the desire of the court to afford opportunity to present any additional facts and views which petitioner desired to present." Upon consideration of the second petition, the court found that it did "not substantially differ from the" first, "and for the reasons stated in the decision in that case" the second petition was also denied.

Petitioner is serving sentence under a conviction in a United States District Court for possessing and uttering counterfeit money. It appears from the opinion of the District Judge denying *habeas corpus* that he believed petitioner was deprived, in the trial court, of his constitutional right under the provision of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right . . . . to have the Assistance of Counsel for his defence."[2] However, he held that proceedings depriving petitioner of his constitutional right to assistance of Counsel

[1] 13 Fed. Supp. 253.

[2] The Sixth Amendment of the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

were not sufficient "to make the trial void and justify its annulment in a habeas corpus proceeding, but that they constituted trial errors or irregularities which could only be corrected on appeal."

The Court of Appeals affirmed[3] and we granted certiorari due to the importance of the questions involved.[4]

The record discloses that:

Petitioner and one Bridwell were arrested in Charleston, South Carolina, November 21, 1934, charged with feloniously uttering and passing four counterfeit twenty-dollar Federal Reserve notes and possessing twenty-one such notes. Both were then enlisted men in the United States Marine Corps, on leave. They were bound over to await action of the United States Grand Jury, but were kept in jail due to inability to give bail. January 21, 1935, they were indicted; January 23, 1935, they were taken to court and there first given notice of the indictment; immediately were arraigned, tried, convicted and sentenced that day to four and one-half years in the penitentiary; and January 25, were transported to the Federal Penitentiary in Atlanta. While Counsel had represented them in the preliminary hearings before the commissioner in which they—some two months before their trial—were bound over to the Grand Jury, the accused were unable to employ Counsel for their trial. Upon arraignment, both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of Counsel.

"Both petitioners lived in distant cities of other states and neither had relatives, friends, or acquaintances in Charleston. Both had little education and were without funds. They testified that they had never been guilty of nor charged with any offense before, and there was no evidence in rebuttal of these statements."[5] In the *habeas corpus* hearing, petitioner's evidence developed that no request was directed to the trial judge to appoint Counsel, but that such request was made to the District Attorney, who replied that in the State of trial (South Carolina) the court did not appoint Counsel unless the defendant was charged with a capital crime. The District Attorney denied that petitioner made request

[3] 92 F. (2d) 748.

[4] 302 U. S. —.

[5] Opinion of the District Judge, 13 Fed. Supp. 253, 254.

to him for Counsel or that he had indicated petitioner had no right to Counsel. The Assistant District Attorney testified that Bridwell "cross examined the witnesses;" and, in his opinion, displayed more knowledge of procedure than the normal layman would possess. He did not recall whether Bridwell addressed the jury or not, but the clerk of the trial court testified "that Mr. Johnson [Bridwell?] conducted his defence about as well as the average layman usually does in cases of a similar nature." Concerning what he said to the jury and his cross examination of witnesses, Bridwell testified: "I tried to speak to the jury after the evidence was in during my trial over in the Eastern District of South Carolina. I told the jury, 'I don't consider myself a hoodlum as the District Attorney has made me out several times.' I told the jury that I was not a native of New York as the District Attorney stated, but was from Mississippi and only stationed for government service in New York. I only said fifteen or twenty words. I said I didn't think I was a hoodlum and could not have been one of very long standing because they didn't keep them in the Marine Corps.

"I objected to one witness' testimony. I didn't ask him any questions, I only objected to his whole testimony. After the prosecuting attorney was finished with the witness, he said, 'Your witness,' and I got up and objected to the testimony on the grounds that it was all false, and the Trial Judge said any objection I had I would have to bring proof or disproof."

Reviewing the evidence on the petition for *habeas corpus*, the District Court said[6] that, after trial, petitioner and Johnson " . . . were remanded to jail, where they asked the jailer to call a lawyer for them, but were not permitted to contact one. They did not, however, undertake to get any message to the judge.

" . . . January 25th, they were transported by automobile to the Federal Penitentiary in Atlanta, Ga., arriving . . . the same day.

"There, as is the custom, they were placed in isolation and so kept for sixteen days without being permitted to communicate with any one except the officers of the institution, but they did see the officers daily. They made no request of the officers to be permitted to see a lawyer, nor did they ask the officers to present to the trial judge

[6] 13 Fed. Supp. 253, 254.

a motion for new trial or application for appeal or notice that they desired to move for a new trial or to take an appeal.

"On May 15, 1935, petitioners filed applications for appeal which were denied because filed too late."

The " . . . time for filing a motion for new trial and for taking an appeal has been limited to three and five days."[7]

*One.* The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done."[8] It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to " . . . the humane policy of the modern criminal law . . ." which now provides that a defendant " . . . if he be poor, . . . may have counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state."[9]

The " . . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evi-

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[7] 13 Fed. Supp. at 256; see, Rules of ~~the Supreme Court of the United States, No. 42.~~ → Practice and Procedure (Criminal Appeals Rules), adopted May 7, 1934, II, III.

[8] Cf., Palko *v.* Connecticut, 302 U. S. 319, 325.

[9] Patton *v.* United States, 281 U. S. 276, 308.

dence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."[10] The Sixth Amendment withholds from Federal Courts,[11] in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of Counsel.

*Two.* There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights[12] and that we "do not presume acquiescence in the loss of fundamental rights."[13] A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

*Patton* v. *United States,* 281 U. S. 276, decided that an accused may, under certain circumstances, consent to a jury of eleven and waive the right to trial and verdict by a constitutional jury of twelve men. The question of waiver was there considered on direct appeal from the conviction, and not by collateral attack on *habeas corpus.* However, that decision may be helpful in indicating how, and in what manner, an accused may—before his trial results in final judgment and conviction—waive the right to assistance of Counsel. The *Patton* case noted approvingly a state court decision[14] pointing out that the humane policy of modern criminal law had altered conditions which had existed in the "days when

[10] Powell *v.* Alabama, 287 U. S. 45, 68, 69.

[11] Cf., Barron *v.* The Mayor, etc., 7 Pet. 243, 247; Edwards *v.* Elliott, 21 Wall. 532, 557.

[12] Aetna Insurance *v.* Kennedy, 301 U. S. 389, 393; Hodges *v.* Easton, 106 U. S. 408, 412.

[13] Ohio Bell Telephone Co. *v.* Public Utilities Commission, 301 U. S. 292, 307.

[14] Hack *v.* State, 141 Wisconsin 346, 351.

the accused could not testify in his own behalf, [and] was not furnished Counsel," and which had made it possible to convict a man when he was "without money, without counsel, without ability to summon witnesses and not permitted to tell his own story, . . ."

The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

*Three.* The District Court, holding petitioner could not obtain relief by *habeas corpus*, said:

"It is unfortunate, if petitioners lost their right to a new trial through ignorance or negligence, but such misfortune cannot give this Court jurisdiction in a habeas corpus case to review and correct the errors complained of."

The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial;[15] and the "writ of *habeas corpus* cannot be used as a writ of error.[16] These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in *habeas corpus* proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding, "it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court"[17] and the petitioned court has "power to inquire with regard to the jurisdiction of the inferior court,

[15] Cf., Ex parte Watkins, 3 Pet. 193; Knewal v. Egan, 268 U. S. 442; Harlan v. McGourin, 218 U. S. 442.

[16] Woolsey v. Best, 299 U. S. 1, 2.

[17] Frank v. Mangum, 237 U. S. 309, 327.

either in respect to the subject matter or to the person, even if such inquiry . . . . [involves] an examination of facts outside of, but not inconsistent with, the record."[18] Congress has expanded the rights of a petitioner for *habeas corpus*[19] and the " . . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the Act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

"There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him. . . .

" . . . it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, . . ."[20]

Petitioner, convicted and sentenced without the assistance of Counsel, contends that he was ignorant of his right to Counsel, and incapable of preserving his legal and constitutional rights during trial. Urging that—after conviction—he was unable to obtain a lawyer; was ignorant of the proceedings to obtain new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was—as a practical matter—impossible for him to obtain relief by appeal. If these contentions be true in

[18] In re Mayfield, 141 U. S. 107, 116; Cuddy, Petitioner, 131 U. S. 280.

[19] 28 U. S. C., ch. 14, Sec. 451, *et seq.*

[20] Frank *v.* Mangum, *supra*, 330, 331; cf., Moore *v.* Dempsey, 261 U. S. 86; Mooney *v.* Holohan, 294 U. S. 103; Hans Nielsen, Petitioner, 131 U. S. 176.

fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by *habeas corpus.* Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty it may well be said—as in *Mooney* v. *Holohan,* 294 U. S. 103, 113—that it "falls with the premise." To deprive a citizen of his only effective remedy would not only be contrary to the "rudimentary demands of justice"[21] but destructive of a constitutional guaranty specifically designed to prevent injustice.

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of Counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing Counsel for an accused who is unable to obtain Counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake.[22] If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus.*[23] A judge of the United States—to whom a petition for *habeas corpus* is addressed—should be alert to examine "the facts for himself when if true as alleged they make the trial absolutely void."[24]

It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus.* When

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[21] Cf., Mooney *v.* Holohan, *supra,* 112.

[22] Cf., Frank *v.* Mangum, *supra,* 327.

[23] Hans Neilsen, Petitioner, *supra.*

[24] Cf., Moore *v.* Dempsey, 261 U. S. 86, 92; Patton *v.* United States, 281 U. S. 276, 312, 313.

collaterally attacked, the judgment of a court carries with it a presumption of regularity.[25] Where a defendant, without Counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel. If in a *habeas corpus* hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had Counsel nor properly waived his constitutional right to Counsel, it is the duty of the court to grant the writ.

In this case, petitioner was convicted without enjoying the assistance of Counsel. Believing *habeas corpus* was not an available remedy, the District Court below made no findings as to waiver by petitioner. In this state of the record we deem it necessary to remand the cause. If—on remand—the District Court finds from all of the evidence that petitioner has sustained the burden of proof resting upon him and that he did not competently and intelligently waive his right to Counsel, it will follow that the trial court did not have jurisdiction to proceed to judgment and conviction of petitioner, and he will therefore be entitled to have his petition granted. If petitioner fails to sustain this burden, he is not entitled to the writ.

The cause is reversed and remanded to the District Court for action in harmony with this opinion.

*Reversed.*

Mr. Justice REED concurs in the reversal.

Mr. Justice MCREYNOLDS is of opinion that the judgment of the court below should be affirmed.

Mr. Justice BUTLER is of the opinion that the record shows that petitioner waived the right to have counsel, that the trial court had jurisdiction, and that the judgment of the Circuit Court of Appeals should be affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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[25] Cuddy, Petitioner, *supra*.